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LIMITATIONS OF LIABILITY WITHIN UNINSURED MOTORIST INSURANCE POLICIES AND THEIR VALIDITY UNDER MANDATORY STATUTES

I. INTRODUCTION

Accidents involving uninsured motorists take a tremendous toll in human life and bodily injury.¹ Although money recoveries are seldom comparable to the "value" of the injuries suffered, they nevertheless provide a source from which to pay some, or hopefully all, out of pocket costs, and some of the more intangible, but none the less real, costs of personal suffering. A substantial number of drivers, however, are unable to respond financially for the damages which they have caused.

To combat this problem, every state has enacted a financial responsibility law.² These laws provide for the suspension of the driving privilege of a driver who is involved in an accident if he is unable either to prove he is insured to the minimum statutory limits, or to post a bond as required by the Director of Motor Vehicles. Such a driver is said to be "financially irresponsible." The trouble with the financial responsibility laws is that one "free bite" is allowed.³ That is, suspension of the driving privilege does not occur until after a financially irresponsible driver is involved in an accident in which damage to one of the cars exceeds a certain sum⁴ and a finding is made that he was at fault.⁵

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1. See A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 10 & n.19 (1969).
 2. Notman, *A Decennial Study of The Uninsured Motorist Endorsement*, 43 NOTRE DAME LAWYER 5 (1968).
 3. Notman, *supra* note 2, at 6, states, "Unfortunately, nearly all such legislation is lacking in one very significant respect reminiscent of the old common-law rule applied to the canine species of tortfeasor: one 'free bite' is allowed."
 4. NEB. REV. STAT. § 60-509 (Reissue 1968), provides for limits of not less than \$10,000 for any one person per accident and \$20,000 for any two or more persons per accident. These are the most common limits.
 5. Before the Supreme Court's decision in *Bell v. Burson*, 402 U.S. 535 (1971), there was a better chance of getting such drivers off the road before they caused injury to others for which they were unable to respond. This is because prior to the Bell decision proof of financial responsibility was required regardless of fault. However, a finding

Since the financial responsibility laws proved inadequate, additional protective methods have been tried in different states with varying degrees of success. The first method tried was compulsory insurance. In 1925 Massachusetts passed a statute requiring insurance as a prerequisite to registration of motor vehicles.⁶ Since that time, a number of other states have enacted similar legislation.⁷ The inadequacies of such an approach are evident. It is impossible to make sure that all drivers on any state's highways are insured. Drivers of unregistered cars cannot be completely eliminated, drivers of hit-and-run vehicles provide no protection for their innocent victims, and drivers from states without compulsory insurance use the roads of the state.⁸

Another approach employed has been the unsatisfied judgment fund which pays claims of those injured by the uninsured motorist from a general state fund.⁹ The fund is supported either by sums

that there is a "reasonable possibility" that judgment will be rendered against him as a result of the accident must now be made before the financially irresponsible motorist may be denied the driving privilege. Notice that the requirement that the financially irresponsible driver be at fault assures that his license may not be suspended until he has had one accident for which an innocent victim cannot recover.

6. Mass. Acts 1925, ch. 346. This provision is now embodied in MASS. GEN. LAWS ANN. ch. 175, § 113L (1972).
7. The states that have adopted some form of compulsory liability insurance are Delaware, Florida, Massachusetts, New York, and North Carolina. Keeton, *No-Fault Insurance: A Status Report*, 51 NEB. L. REV. 183, 184 (1972).
8. New York's statute contains the following "Declaration of Purpose," which sets forth its reasons for supplementing its compulsory insurance. "The legislature finds and declares that the motor vehicle financial security act . . . which requires . . . proof of financial security as a condition to registration, fails to accomplish its full purpose of securing to innocent victims of motor vehicle accidents recompense for the injury . . . in that the act makes no provision for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by (1) uninsured motor vehicles registered in a state other than New York, (2) unidentified motor vehicles which leave the scene of the accident, (3) motor vehicles registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance, (4) stolen motor vehicles, (5) motor vehicles operated without the permission of the owner, (6) insured motor vehicles where the insurer disclaims liability or denies coverage and (7) unregistered motor vehicles." N.Y. INS. LAW § 600(2) (McKinney 1966).
9. The states that have adopted some form of unsatisfied judgment fund are Maryland, New Jersey, New York, and North Dakota. MD. ANN. CODE art. 66½, §§ 7-601 to 7-635 (1957); N.J. REV. STAT. §§ 39-6-61 to 39-6-104 (Supp. 1971); N.Y. INS. LAW §§ 600 to 626 (McKinney 1966); N.D. CENT. CODE §§ 39-17-01 to 39-17-10 (Supp. 1971).

collected through an addition to the registration fee or by the insurance industry itself. The unsatisfied judgment fund is most frequently used to complement either compulsory insurance or uninsured motorist protection. Used in this way, it fills the gaps in coverage left by these methods of protection, but allows the bulk of coverage to be assumed through private insurance contracts.

A growing number of states have enacted some form of no-fault insurance.¹⁰ This method of protection is similar to uninsured motorist protection in that indemnity insurance is purchased to reimburse the purchaser for damages to himself. The major difference in theory is that under the fault system, protection against uninsured motorists is provided in case the party at fault is unable to respond for the damages he caused, whereas under no-fault, the policyholder recovers from his own insurer regardless of the financial responsibility of the other driver and regardless of which party was at fault.

Following New York's adoption of compulsory insurance in 1956, the insurance industry, in an apparent effort to forestall other states from adopting compulsory insurance, made uninsured motorist protection generally available.¹¹ Since that time, forty-four states have adopted compulsory uninsured motorist statutes. The uninsured motorist statutes tend to be similar in many respects. Generally they provide that no liability policy shall be issued within the state unless coverage is provided with the minimum limits in the financial responsibility act "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles [or] hit and run motor vehicles because of bodily injury, sickness, or disease, including death. . . ."¹² This provision is fairly standard. The statutes differ, however, in the amount of coverage required,¹³ whether the state allows a written waiver of coverage,¹⁴ whether or not coverage for property damage is required,¹⁵

10. The states that have adopted some form of no-fault insurance are Delaware, Florida, Illinois, Massachusetts, Minnesota, Oregon, and South Dakota. Keeton, *supra* note 7 at 183-92.

11. A. WIDISS, *supra* note 1, 13-14.

12. NEB. REV. STAT. § 60-509.01 (Reissue 1968).

13. The limits vary from \$5,000 for one person and \$10,000 per accident, to \$15,000 for one person and \$30,000 per accident.

14. Most states allow the insured to reject the uninsured motorist protection. Many require this rejection to be in writing.

15. Georgia, New Mexico, South Carolina, and West Virginia require that property damage coverage be offered with the uninsured motorist policy. GA. CODE ANN. § 56-407.1 (1971); N.M. STAT. ANN. § 64-24-

and whether provision is made to allow insurance companies to restrict liability to that which would be available had the driver or owner of the uninsured vehicle been insured as required by the financial responsibility laws through the use of setoffs, excess clauses, and "other insurance" clauses.¹⁶

With the widespread adoption of mandatory uninsured motorist protection statutes, courts were asked to construe certain provisions of the standard policy which sought to limit the recovery by an insured to that which he would have received from the uninsured motorist had he been insured to the minimum limits prescribed by the financial responsibility law. A slight majority of the courts have looked with disfavor on such limitations, generally relying on public policy arguments.¹⁷ The others have upheld the provisions, appealing to what they concluded was the real purpose of the legislation.¹⁸ The purpose of this article is to summarize the reasoning of the courts, to recommend that the courts upholding such provisions have reached the better resolution, and finally, to propose corrective legislative action.

II. READING THE POLICY

In order to understand how the courts have looked at uninsured motorist coverage under the statute, examination of the insurance policy in the absence of such a statute is a reasonable starting point. Obviously, in light of the general wording of the typical statute, the uninsured motorist provisions vary somewhat. However, adoption of a "standard form" by a large percentage of the industry¹⁹ has led to a great deal of uniformity in uninsured motorist provisions, and even those not adopting the form use similar provisions.²⁰

105 (1953); S.C. CODE ANN. § 46-750.33 (Supp. 1971); W. VA. CODE ANN. § 36-6-31 (Supp. 1971).

16. California, Iowa, and Tennessee each have statutes providing for the efficacy of such clauses. See note 78 *infra*.

17. See, e.g., *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970), and cases note 28 *infra*.

18. See, e.g., *Travelers Indem. Co. of Hartford v. Wells*, 316 F.2d 770 (7th Cir. 1963), and cases note 28 *infra*.

19. Representatives of the National Casualty Underwriters and the Mutual Insurance Rating Bureau collaborated in drafting this provision. It is estimated that two-thirds of the industry companies belong to one or the other of these associations. A. WIDISS, *supra* note 1, 22 & n.6.

20. This article will use the wording of the 1966 Standard Coverage Part, Protection Against Uninsured Motorists Insurance. Of course, other wordings might give rise to different results, but an analysis in terms of this standard form will be applicable to most policy pro-

Generally, the policy agrees to pay "all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured. . . ."²¹ The main purpose of this provision is to set out specifically the risk covered by the policy, i.e., bodily injury incurred as a result of an accident caused by an uninsured owner or motorist. It seems clear that "all sums" the insured is "legally entitled to recover" is meant to refer to any amount which the insured shall be entitled to collect from the uninsured owner or motorist within the maximum limits and subject to the limitations provided, and *not to extend coverage* beyond the limits and exclusions in other parts of the endorsement.

The second policy provision of interest entitled "Limits of Liability" provides that any amount payable shall be reduced by all sums paid by or on behalf of the owner or operator of the uninsured highway vehicle and any other organization jointly or severally liable. This seems straight-forward and fair. Also, the present value of amounts payable under workmen's compensation is to be set off, as are payments made by the insurer for medical payments coverage.

The final provision of interest is that entitled "Other Insurance." Since this provision is at the forefront of the debate over uninsured motorist coverage, it is set out below in its entirety.

With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.²²

Notice that the first clause refers only to the situation where the insured is occupying an automobile not owned by him. In such a

visions being used. For the complete wording of the 1956 and 1966 standard form uninsured motorist endorsements, see A. WIDISS, *supra* note 1, app. A, 1. at 291.

21. *Id.* at 292.

22. *Id.* at 296.

situation the clause provides that coverage is to be excess only, and seeks to restrict recovery to the amount by which its policy limits exceed the "other similar insurance available."

The clause works as follows. Suppose A is riding in a car owned and driven by B, and the car is struck by a negligent uninsured motorist. If B's uninsured interest policy has \$10,000/20,000 limits, and A's policy has \$15,000/30,000, A and B will be allowed to recover up to \$10,000 each under B's policy. A will be allowed to collect any additional uncompensated damages up to \$5,000 (the amount by which A's limits exceed B's) under his own policy. (B, not being an insured under A's policy, would not be entitled to recover under A's policy.) On the other hand, if A's policy limits were \$10,000/20,000, its limits would not exceed B's "other similar insurance available" and neither B nor A would be allowed recovery under A's policy. Such a clause is known as an excess-escape clause, because it covers only damages in excess of the other similar insurance available, and if the limits do not exceed the other insurance, then the clause operates to allow the insurer to "escape" liability altogether.

The phrase "any other similar insurance available" is important to the meaning of the first clause because many courts have relied on it to invalidate the "other insurance" clause in the policy. It is evident, when considered in conjunction with the phrase "and applicable to such vehicle as primary insurance," that the phrase simply refers to any uninsured motorist protection carried by the owner or driver of the vehicle in which the insured was riding, and under which he also qualifies as an insured. Some courts have confused the words "available" and collectible." A person involved in an accident to which a policy with \$10,000/20,000 limits applies has \$10,000 "available" to him. If more than one other party is injured and the above coverage is applicable to them, the entire \$10,000 may not be "collectible."²³

The second clause provides that in any situation in which more than one policy applies, *except* in the situation where the insured is occupying a vehicle not owned by the named insured, recovery will not exceed the highest limit of the applicable policies, and the insurer will pay no more than the proportion of that limit which equals the proportion of its limits over the sum of the applicable limits. To illustrate, if A is struck by an uninsured motorist and has two different policies on two different cars each containing

23. For a good discussion of the distinction between "available" and "collectible," see *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 71, 83, 269 N.E.2d 97, 103 (1970).

clauses similar to the ones under discussion, with individual limits of \$5,000 and \$15,000 respectively, the maximum recovery by A would be \$15,000 (the highest applicable limit). The insurer with the \$5,000 limit would pay $1/4$ of that sum. $\left(\frac{5,000}{5,000 + 15,000} \right)$ The other insurer would pay the remainder ($3/4$ of \$15,000). Such a provision is known as a pro rata clause.

The excess-escape and pro rata clauses are known as "other insurance" clauses. "Other insurance" clauses come in other forms than those contained in the uninsured motorist policy,²⁴ but all are attempts by the insurance companies to delineate within the policy exactly how much will be paid and by whom in the event of double coverage. Although a few jurisdictions have decided that they are hopelessly contradictory and refuse to give them effect,²⁵ most courts have seen no such contradiction or have recognized the intention of the insurers and have given effect to the obvious purpose of the clauses.²⁶

The two "other insurance" clauses utilized in the standard uninsured motorist policies operate upon each other as follows. Where two pro rata clauses apply to a particular accident they both seek to pro rate the damages based on the limits of the respective policies. The provisions of each may be carried out without contradicting either policy. In the case of an insured occupying an automobile not owned by a named insured, the passenger's insurance operates on the excess-escape provision. The owner's policy falls under the second clause which seeks to pro rate its liability with "other similar insurance available." These two might seem to conflict, but it has been consistently held that policies con-

24. There are three traditional "other insurance" clauses. The first is the pro rata which is similar to the provision in the second paragraph of the quoted "other insurance" clause. The second is the excess clause which provides that its coverage will be available only in the event damages exceed other available insurance. The third is the escape clause which provides that no protection will be available if any other insurance covers the loss. The first paragraph of the quoted "other insurance" clause is a hybrid of the excess and escape clauses.

25. See *Lamb-Weston v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110, rehearing denied, 219 Ore. 130, 346 P.2d 643 (1959).

26. See *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959). See also *Zurich Gen. Accident and Liab. Ins. Co. v. Clamor*, 124 F.2d 717 (7th Cir. 1941); *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 71, 269 N.E.2d 97 (1970); 8 J. APPLEMAN, *INSURANCE LAW AND PRACTICE*, §§ 4913 at 385 (1942); Mattison, "Other Insurance" Clauses: *The Lamb-Weston Doctrine*, 47 ORE. L. REV. 430 (1968); Watson, *The "Other Insurance" Dilemma*, 54 ILL. B. J. 486 (1966); Comment, *Concurrent Coverage in Automobile Insurance*, 65 COLUM. L. REV. 319 (1965); Annot., 76 A.L.R.2d 502 (1961).

taining excess or escape clauses are not "other similar insurance available" upon which the pro rata clause can act.²⁷ This result is supported by the fact that both policies' pro rata clauses contain the words "Except as provided in the foregoing paragraph . . ." indicating a common design to allow the insurer of one occupying a nonowned vehicle which is covered by the uninsured motorist protection of either the owner or the driver to so limit his liability.

III. APPLYING THE STATUTE

Following the widespread adoption of uninsured motorist statutes, it became evident that there was some question as to exactly what the statutes required. Insurance policies were issued with the above limitations, but injured plaintiffs wanted such clauses set aside. Courts that have had to consider the problem have not acted uniformly, although recently those striking down these clauses have been in the majority.²⁸

The courts that have invalidated "other insurance" and setoff clauses within uninsured motorist policies have made one or more of three errors. First, they have failed to correctly interpret the requirements of the statute. Second, most have relied, to a greater

27. In *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 251, 99 N.W.2d 26, 37 (1959), the court considered the relation between an excess and pro rata clause and held: "The only construction of the 'other insurance' clause under which both its parts will be meaningful is that the excess provision alone controls in every situation which falls within its terms, such as when a person is driving the car of another and both the driver and the owner have insurance, and that the *prorate* provision alone governs in all other situations, for example, when more than one policy has been issued to the same person."

28. For decisions following the majority opinion, see *Safeco Ins. Co. of America v. Robey*, 399 F.2d 330 (8th Cir. 1968); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970); *Safeco Ins. Co. of America v. Jones*, 243 So. 2d 736 (Ala. 1970); *Transportation Ins. Co. v. Wade*, 11 Ariz. App. 14, 461 P.2d 190 (1970); *Sellers v. U.S. Fidelity and Guar. Co.*, 185 So. 2d 689 (Fla. 1966); *Travelers Indem. Co. v. Williams*, 119 Ga. App. 414, 167 S.E.2d 174 (1969); *Meridian Mut. Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. 1970); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 241 A.2d 112 (1968); *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965); *Annot.*, 28 A.L.R.3d 551, § 4 (1969). *Contra*, *Travelers Indem. Co. v. Wells*, 316 F.2d 770 (4th Cir. 1963); *M.F.A. Mut. Ins. Co. v. Wallace*, 245 Ark. 230, 431 S.W.2d 742 (1968); *Tindall v. Farmers Auto. Management Corp.*, 83 Ill. App. 2d 165, 226 N.E.2d 397 (1967); *Maryland Cas. Co. v. Howe*, 106 N.H. 422, 213 A.2d 420 (1965); *Russell v. Paulson*, 18 Utah 2d 157, 417 P.2d 658 (1966); *State Farm Mut. Auto. Ins. Co. v. Bafus*, 466 P.2d 159 (Wash. 1970); *Annot.*, 28 A.L.R.3d 551, § 3 (1969).

or lesser extent, on an irrelevant assertion that the statute fixes a minimum but does not fix a maximum.²⁹ Third, many courts erroneously state that a premium has been paid for the coverage, and therefore it would be inequitable to deny coverage.³⁰ All three types of decisions will be examined.

The first case in which the validity of "other insurance" clauses was considered in light of a mandatory uninsured motorist statute was *Travelers Indemnity Co. v. Wells*.³¹ The plaintiff was a guest in a car which was struck by an uninsured motorist. Both the owner and the plaintiff recovered under the owner's policy. The plaintiff, having recovered less than his actual damages, then brought suit against his insurer to recover the balance. His policy had a provision similar to that in the first paragraph of the standard form stating that, in the event an insured was injured while occupying an automobile not owned by the named insured, then the insurance would only apply as excess in the amount that the limits therein exceeded any other applicable limits. In seeking to apply Virginia law, the Fourth Circuit concluded that the Virginia Court of Appeals would uphold such clauses. In its opinion reversing the trial court and holding for the insurer, the court stated:

The Law did not propose to provide an injured guest with uninsured protection beyond the statutory amounts through a combination of the host's insurance and that owned by the guest for himself.³²

The court explained that the result sought by the insured would result in the insured's being allowed a larger recovery when struck by an uninsured motorist than when struck by a person insured to the minimum of the financial responsibility law. "Such a result is nowhere intimated in the Law."³³

Two years later the Virginia Court of Appeals was presented with a similar problem. In the often cited case of *Bryant v. State Farm Mutual Automobile Insurance Co.*,³⁴ the Fourth Circuit's holding in *Wells* was effectively overruled. In the *Bryant* case the plaintiff was driving his father's truck when he collided with

29. The resolution of this problem is not even remotely dependent on the absence of a maximum limit.

30. For what was the premium paid? It seems that the insured paid for coverage containing an excess-escape clause and that is what he received. There is little doubt that invalidating these clauses will tend to raise premiums, which might have the tendency of increasing the number of people who waive the coverage.

31. 316 F.2d 770 (4th Cir. 1963).

32. *Id.* at 773.

33. *Id.*

34. 205 Va. 897, 140 S.E.2d 817 (1965).

an uninsured motorist. At the time of the accident, the plaintiff qualified both as an insured under his father's policy, which covered his father "and any other person while occupying the insured motor vehicle," and as the named insured under a policy issued to him. The plaintiff recovered to the extent of the limits of his father's policy. His judgment against the uninsured motorist far exceeded the sum of the limits of the two policies. He maintained that he should be allowed to recover from his own insurer. His insurer defended on the ground that the plaintiff was an insured occupying a vehicle not owned by the named insured, and therefore, operation of the excess-escape clause resulted in coverage only in the amount that its limits exceeded his father's policy limits. In this case the limits of the two policies were identical, so the insurer contended that no coverage was provided.

The court held for the insured, allowing recovery under his own policy in spite of the excess-escape clause. In reaching its decision, the court stated that a statutory provision is as much a part of the policy as if it were clearly written therein.³⁵ From this it reasoned that any provisions in an insurance policy which conflict with the statute, "either by adding to or taking from its requirements, are void and ineffective."³⁶ The statute, the court maintained, requires that no policy be issued unless it undertakes to pay the insured "all sums" he is legally entitled to recover from an insured motorist. This policy,

undertakes to pay the insured not 'all sums which he shall be legally entitled to recover as damages,' as the statute commands, but only such sum as exceeds 'any other similar insurance available' to him Clearly this provision places a limitation upon the requirement of the statute and conflicts with the plain terms of the statute.³⁷

The court misconstrued the meaning of the words "all sums which he shall be legally entitled to recover as damages." The plaintiff's judgment against the uninsured motorist was \$85,000. Considering the facts that the limits in each applicable policy were \$10,000, and that the plaintiff was allowed recovery of only \$10,000 on each policy, it seems clear that this phrase has no bearing on the policy limits since the court did not allow the plaintiff to recover \$85,000 (which is the sum he is legally entitled to recover). The Virginia court makes this clear when it says, "The sum he is entitled to recover under that requirement is the unpaid part of his judgment *within the limit of the policy.*"³⁸ The

35. *Id.* at 899, 140 S.E.2d at 818.

36. *Id.* at 900, 140 S.E.2d at 819.

37. *Id.* at 901, 140 S.E.2d at 820.

38. *Id.* (emphasis added).

policy is limited by the "other insurance" clause. Obviously the court's reliance on these words is misplaced. The real issue, which the court did not face, was whether or not the insurance undertook to pay "all sums" within limits which were no less than required by Virginia's financial responsibility law.

As in Virginia, the validity of "other insurance" clauses in Florida was first considered in a federal court. The Fifth Circuit upheld such a clause, but the Florida Supreme Court a year later held them to be void under the uninsured motorist statute. In *Chandler v. Government Employees Insurance Co.*,³⁹ the plaintiff-insured was a passenger in an automobile that collided with an uninsured motorist. The driver had uninsured motorist insurance under which the plaintiff qualified as an "insured," since he was an occupant of the insured vehicle. He was also an "insured" under his own liability policy. The driver's policy paid to the extent of its limits, but the plaintiff had not been fully compensated. Plaintiff sued his insurer who defended on the grounds of the excess-escape clause contained within the plaintiff's policy. In holding for the insurer, and giving efficacy to the clause, the Fifth Circuit said:

[W]e conclude that the public policy of the state of Florida, in providing for such protection, was to afford the public generally the same protection that it would have had if the uninsured motorist had carried the minimum of \$10,000 and \$20,000 limits as public liability coverage. The protection afforded by the 'other insurance' on the car in which appellant was a guest affords that amount of protection. . . .⁴⁰

This, the court reasoned, is true because Florida's limits of protection are \$10,000 for one person per accident and \$20,000 per accident.

The following year, the Florida Supreme Court settled the issue in Florida with its holding in *Sellers v. United States Fidelity & Guaranty Co.*⁴¹ The facts were similar to those in the *Chandler* case. The plaintiff qualified as an "insured" under the policy of the driver of a car in which he was a passenger, and also under his own family policy. The court held that the excess-escape clause in the plaintiff's policy was invalid. It stated that all provisions in an insurance policy which are not in conformity with the statute are excluded, and that there was no latitude within the statute for an insurer to restrict its coverage through excess-escape and pro rata clauses. This, the court reasoned, was because

39. 342 F.2d 420 (5th Cir. 1965).

40. *Id.* at 421 (emphasis added).

41. 185 So. 2d 689 (Fla. 1966).

the policy provided coverage which was contrary to the statutorily limited amounts of coverage. The statute "does not limit an insured only to one . . . recovery," but is "designed to protect the insured as to his actual loss within such limits."⁴²

Apparently the court thought that a limitation of coverage such as that accomplished through the operation of an excess-escape clause provided less insurance than was required by the financial responsibility act. The argument that the court makes to support this conclusion, however, is less than persuasive. It would seem that an assertion that the statute places no limit on the recovery available would lend no support to the contention that insufficient coverage was provided. No contention was made that the insurer cannot write policies with limits in excess of the statutory minimum. The question is whether the policy affords the *very minimum* required by statute, and the court did not address itself to this problem.⁴³

In *Safeco Insurance Co. of America v. Jones*,⁴⁴ a recent case in which the insured was injured by an uninsured motorist while a passenger in an automobile whose carrier had already paid up to its policy limits, the Alabama Supreme Court, in striking down the excess-escape clause, combined the "no maximum" error and the "premium paid" error in a cogent and typical summation.

We hold that our statute sets a minimum amount for recovery, but it does not place a limit on the total amount of recovery so long as that amount does not exceed the amount of actual loss; that where the loss exceeds the limits of one policy, the insured may proceed under other available policies; and that where the premiums have been paid for uninsured motorist coverage, we cannot permit an insurer to avoid its statutorily imposed liability by its insertion into the policy of a liability limiting clause which restricts the insured from receiving that coverage for which the premium has been paid.⁴⁵

The error in the "no limit" argument has been previously discussed. The court's other contention, that recovery under both policies to the extent of the insured's actual injuries must be al-

42. *Id.* at 692.

43. Many courts invalidating "other insurance" clauses have considered this "no limit" argument to be persuasive. See *Safeco Ins. Co. of America v. Robey*, 399 F.2d 330, 336 (8th Cir. 1968); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Safeco Ins. Co. of America v. Jones*, 243 So. 2d 736, 742 (Ala. 1970); *Transportation Ins. Co. v. Wade*, 11 Ariz. App. 14, 16, 461 P.2d 190, 192 (1970); *Travelers Indem. Co. v. Williams*, 119 Ga. App. 414, 417, 167 S.E.2d 174, 176 (1969); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 395, 241 A.2d 112, 115 (1968); *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 543, 155 S.E.2d 128, 136 (1967).

44. 243 So. 2d 736 (Ala. 1970).

45. *Id.* at 742.

lowed so that the insured may receive the coverage for which the premium was paid, is also without merit. The insured paid for a policy of insurance which guaranteed to the insured, up to the statutory minimum, whatever damages he was legally entitled to collect from an owner or operator of an uninsured motor vehicle. This coverage, by the wording in its "other insurance" clause, provides that in the case of more than one applicable coverage, the highest policy limit is the most recoverable by the insured, and that under certain circumstances, the insurers will pro rate. This is what the policy said and it is for this coverage that the premium was paid. Allowing recovery in excess of this coverage will actually result in a windfall to the insured since he will receive more coverage than he paid for.

It is interesting to note that most courts considering "other insurance" clauses in the absence of a mandatory statute did not even mention the "premium paid" issue. On the other hand, many courts invalidating "other insurance" clauses based their decisions at least to some extent on this untenable argument.⁴⁶ This is particularly interesting when it is noted that the argument is unrelated to the statute. That is, the argument, specious though it may be, is equally applicable in the presence or absence of mandatory uninsured motorist insurance.

At this point a critical re-examination of the statute is in order. Most courts, when looking at the statute, have talked in general terms, such as "any attempt to restrict coverage below the statutory minimum is invalid,"⁴⁷ or they have focused on the words "legally entitled to recover as damages."⁴⁸ The real issue is: Does an uninsured motorist provision containing "other insurance" and workmen's compensation and medical payments setoff clauses *provide coverage in limits set forth in the financial responsibility act*? The statute does not specifically allow for such provisions, but this, in itself, is an insufficient reason for holding them invalid. Neither, parenthetically, is sympathy for uncompensated, innocent accident victims.

Probably the best way of analyzing whether policies so limited provide coverage in limits prescribed by the financial responsibility

46. For opinions which have considered this argument persuasive, see *Booth v. Seaboard Fire & Marine Ins. Co.*, 431 F.2d 212, 218 (8th Cir. 1970); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Safeco Ins. Co. of America v. Jones*, 243 So. 2d 736, 742 (Ala. 1970); *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 793, 457 P.2d 34, 41 (1969); *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 570, 156 N.W.2d 133, 139 (1968); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 396, 241 A.2d 112, 115 (1968).

47. See discussion *supra* at 167.

48. *Id.*

law is to compare the recovery by a victim who is hit by a financially responsible driver with that of one who is hit by an uninsured motorist. Suppose A is a passenger in B's car when it is struck by C. If C is financially responsible, A and B can collect up to \$10,000 each (in a state requiring limits of 10/20). Now, suppose C is an uninsured motorist, and A and B have uninsured motorist insurance containing standard "other insurance" clauses. If, after recovery of \$10,000 under B's policy, A attempts to recover under his own policy and the "other insurance" clause in his policy is invalidated by the court, A will be allowed a total recovery of \$20,000. This is obviously acceptable considering the statutory minimum. But, is it more than is required by the statutes? Assume, finally, that both A's and B's "other insurance" clauses are given effect. The result is a recovery by A of \$10,000. Does this not qualify as coverage provided in limits set out in the financial responsibility act? In the financial responsibility act the coverage is limited to a minimum of \$10,000 per person for one accident. If an insurer limits the recovery in an identical fact situation to the identical recovery, it is submitted that this is providing coverage to the statutory minimum. The insurer has assured the policyholder that he will be allowed to recover damages to at least the statutory minimum. No more is required.

IV. THE NEBRASKA DECISIONS

On three occasions the Nebraska Supreme Court has considered the efficacy of "other insurance" and setoff clauses under Nebraska's uninsured motorist statute.⁴⁹ The Eighth Circuit has done so once. In all four cases the courts followed what has emerged as the majority opinion, and invalidated the "other insurance" and setoff clauses.

In the first of these decisions, *Stephens v. Allied Mutual Insurance Co.*,⁵⁰ the plaintiff-insured was in collision with a party by the name of Russell. She was awarded a default judgment against Russell in the amount of \$50,000, and recovered \$5,000 through the receiver of Russell's insurance company, which had become insolvent. In addition she recovered \$1,000 from her own insurer through the medical payments coverage provided in her liability policy. She then brought suit against her carrier for the balance recoverable under her policy. Two issues were raised. First, was Russell an uninsured motorist? This depended on whether subsequent insolvency of a driver's insurer could be considered a "denial of coverage" as provided for in the policy. The court re-

49. NEB. REV. STAT. § 60-509.01 (Reissue 1963).

50. 182 Neb. 562, 156 N.W.2d 133 (1968).

solved this issue in favor of the insured, holding that Russell was an uninsured motorist under the words of the policy.⁵¹

The second issue involved was whether the court would allow a setoff of the medical coverage against the uninsured motorist as provided for in the policy. The court held it would not. This is a curious opinion because in three different places it sets forth the rationale which is often used by courts in upholding such policy provisions, *i.e.*, that an insured is entitled to recover the same amount he would have recovered from an insured motorist.⁵² The court, however, proposed a rule of law which directly contravenes that rationale, and interestingly enough, laid out the rationale and the rule in the same paragraph.

The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through 'other insurance,' excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance.⁵³

The inconsistency between the rule and the argument becomes apparent when it is recalled that invalidation of "other insurance" clauses often results in larger recoveries by those who have been injured by uninsured motorists than by those injured by insured motorists, depending on how many policies the victim of the uninsured motorist could summon to cover the risk.

The court, in reaching its decision, declared that either the insurer was attempting to lower the coverage required by statute, which would be void because contrary to the statute and the declared public policy and purpose,⁵⁴ or it was attempting to change the terms of the medical coverage, a policy which was separately contracted and paid for.⁵⁵

The court would allow the insurer to do neither. Had the insurer actually been trying to change the terms of its medical coverage through the provisions of its separately provided uninsured motorist protection, the clause should have been invalidated. But, the words of the policy indicate that such was not the case. The setoff clause provided that the insurer would not be obligated to pay "under this coverage" amounts paid or payable under the medical payments coverage of the policy.

51. *Id.* at 569, 156 N.W.2d at 138.

52. *Id.* at 565, 569, 571, 156 N.W.2d at 136-37, 138, 139.

53. *Id.* at 571, 156 N.W.2d at 139.

54. Once again the court makes reference to but fails to apply the purpose.

55. 182 Neb. at 570, 156 N.W.2d at 139.

Summary disposition of such clauses as invalid limitations of the statute certainly falls short of adequate justification for invalidating them. Had the court allowed recovery to the same extent as would have been recovered if the negligent party had been insured, which it stated was the proper end result, it would have reached a better solution. Following this reasoning the insurer should have been allowed to set off such payments if the court would have allowed the insurer to be subrogated to the funds recovered by the insured from the damaging party in the amount of the medical coverage payments made to the insured by the insurer. Only in this way could the court's rationale be sustained.

"Other insurance" and setoff clauses were next considered by the Eighth Circuit in *Booth v. Seaboard Fire and Marine Insurance Co.*⁵⁶ The decedent-insured was killed when struck by an uninsured motorist. He was the named insured under two policies, both of which contained workmen's compensation setoff clauses⁵⁷ and "other insurance" clauses. In this case the insured was occupying a highway vehicle not owned by a named insured, so the first paragraph of the "other insurance" clause was operative, and both were controlled by an excess-escape clause. According to the weight of authority, two excess-escape clauses are inconsistent and therefore the coverage is prorated.⁵⁸ The court held both policies applicable to the extent of their combined limits, thus totally rejecting the words of the policy. It would seem that noncontradictory portions of the policy, particularly the provisions limiting total liability to the highest applicable limit, should have been given effect. The opinion recognized that the Nebraska Supreme Court had given effect to an excess type of "other insurance" clause in *Turpin v. Standard Reliance Insurance Company*,⁵⁹ but concluded that Nebraska law would invalidate the excess-escape clause because "such an agreement runs contradictory to the insuring agreement . . . which reads that the company shall pay 'all sums' which the insured could recover from the uninsured carrier."⁶⁰ This contention has been discussed previously. The insurer agreed to pay all sums within the policy limits and subject to the conditions set out in the policy.

The case also required a determination of the validity of the workmen's compensation setoff clause. The issue had been vir-

56. 431 F.2d 212 (8th Cir. 1970).

57. See A. WISS, *supra* note 1 App. A, 1. at 297.

58. See p. 164 *supra*.

59. 169 Neb 233, 99 N.W.2d 26 (1959).

60. 431 F.2d at 217. It should be borne in mind that the conditions of the policy set forth the coverage afforded, and that the limits merely place a ceiling on the amount that will be paid out in the event the conditions are satisfied.

tually determined in the *Stephens* case. In disallowing the setoff, the court reached the proper result, because "workmen's compensation benefits are never set off in favor of the tortfeasor."⁶¹ Thus, such a setoff would not allow the insured coverage as provided for in the financial responsibility law.⁶²

The Nebraska Supreme Court recently considered the problem again in the twin cases of *Bose v. American Family Mutual Insurance Co.*,⁶³ and *Protective Fire and Casualty Co. v. Woten*.⁶⁴ In the *Bose* case, Herman Bose had two separate policies covering two different automobiles. His son, Lynn, was injured when in collision with an uninsured motorist. Damages were found to be \$20,000. Each policy contained "other insurance" clauses. The pro rata provisions applied because other similar insurance was available to the insured and he was occupying an automobile owned by the named insured. In a short opinion, the court invalidated the "other insurance" clause, allowing the plaintiff to recover the full \$10,000 from each insurer. The court based its decision on public policy, the expectations of the insured, and at least impliedly, on the payment of two premiums. It addressed itself to the "spirit of the statute" but failed to mention the literal requirements thereof. The "two premium" argument as explained above is invalid, since the insured purchased policies containing the very limitations in question. The "expectations of the insured" argument is but another aspect of the "two premium" argument in that the reason one might expect to be allowed recovery under both policies is that the insured paid for two different policies. The policy, however, did not provide for such coverage, and if withholding this protection does not contravene the statute, it should not be written into the policy by the court.

In the course of the *Bose* opinion, the court stated, "One argument for defendant is that the Legislature intended to *require the insurer's offer only to equal the minimum limits under financial responsibility laws.*"⁶⁵ Not only is this one argument for the defendant, it is the exact requirement of the statute.⁶⁶ Had the

61. 431 F.2d at 219.

62. The insured would be allowed a "double recovery" if he had been struck by a motorist complying with the financial responsibility act. Therefore, a provision in an uninsured motorist policy which restricts coverage below a "double recovery" should be unacceptable under the statute.

63. 186 Neb. 209, 181 N.W.2d 839 (1970).

64. 186 Neb. 212, 181 N.W.2d 835 (1970).

65. 186 Neb. 209, 211, 181 N.W.2d 839, 840 (emphasis added).

66. Can it be contended that the statutory clause "unless coverage is provided therein . . . in limits . . . set forth in [the financial responsi-

court considered this "argument" in its proper context, as the statutory requirement rather than "one argument" as to legislative intent, it would have reached the real issue: did the insurance provided equal the minimum limits under the financial responsibility law? Instead the court merely stated that the provision violated the "spirit of the statute."⁶⁷

In *Protective Fire and Casualty Co. v. Woten*,⁶⁸ Woten, while a passenger in Turner's car, was injured in an accident with an uninsured motorist. Turner's uninsured motorist insurer paid \$10,000 to Turner and \$10,000 to Woten. Woten's insurance company was seeking a declaration from the court that it was not liable on its policy.⁶⁹ The court held "other insurance" clauses within uninsured motorist policies to be invalid in light of the mandatory statute.

The decision begins with a quotation from the *Sellers* case,⁷⁰ which states that invalidation of "other insurance" clauses is imperative if the statute is to be "meaningful."⁷¹ Next comes a quotation from the *Bryant* case,⁷² containing the argument that the statute requires that the policy undertake to pay all sums he is legally entitled to recover as damages from the uninsured motorist "within the limits of the policy."⁷³ As previously noted, the "other insurance" clause is such a policy limit, and therefore the contention is of little use in determining which limits are permissible under the dictates of the statute. The decision next refers to the "beneficent purpose" of the law.⁷⁴ There is no doubt that such a general purpose was intended, but a dislike for uncompensated victims of uninsured motorists is not a sufficient reason to allow recovery in excess of the policy limits when such limits are in conformity with the statutory requirement.

Apparently the statements in the *Stephens* opinion, to the effect that a victim of an uninsured motorist should be allowed the same protection that he would have had if he had been struck by

bility act]" contemplates something different from "require[s] the insurer's offer only to equal the minimum limits under financial responsibility laws"?

67. 186 Neb. at 211, 181 N.W.2d at 841.

68. 186 Neb. 212, 181 N.W.2d 835 (1970).

69. Recall that in a situation such as this the policy in which Woten is a named insured professes through its "other insurance" clause to provide excess insurance in the amount that its limit exceeds the limits of the other available insurance.

70. 185 So. 2d 689 (Fla. 1966), and discussion pp. 168-69, *supra*.

71. 186 Neb. at 215, 181 N.W.2d at 837.

72. 205 Va. 897, 140 S.E.2d 817 (1965), and discussion pp. 166-67, *supra*.

73. 186 Neb. at 216-17, 181 N.W.2d at 837.

74. *Id.* at 216, 181 N.W.2d at 837.

an insured motorist, were presented to the court by the insurance company. The court responded by saying, "In *Stephens* we had only one policy and were concerned with deductions which would reduce the recovery below the statutory minimum."⁷⁵ It is conceded that the factual situations are different, but both cases were concerned with deductions which the insured parties contended would reduce the recovery below the statutory minimum, and the argument proposed in *Stephens* is equally applicable to both fact situations.

The decision twice makes reference to the fact that the premium was paid and the insured should have the benefit of that premium.⁷⁶ The error in this reasoning has been discussed previously. The coverage for which the premium was paid included certain "other insurance" and setoff clauses, which allow for coverage up to the limits set forth therein. That is, the insurer had guaranteed that if an insured is involved in an accident with an uninsured motorist, there will be \$10,000 available for one person, and \$20,000 for any one accident—no more, no less.

The courts of Nebraska, and those reaching similar decisions in other jurisdictions, have resolved the issues out of confusion as to the proper meaning of the statute. Few, if any, have recognized the real issue, which is: have the insurance companies offering this coverage provided protection in limits which equal the *minimum* requirements of the financial responsibility law?

V. SUGGESTED LEGISLATION

Because of the misapplication of the statute, it is evident that legislation is in order. It seems desirable that a statute be worded so that the minimum coverage afforded will not be dependent on the exigencies of a particular situation, such as how many cars the insured owns or whether he is driving his own car or one owned by a friend or employer. Other states have included provisions in their uninsured motorist statutes which provide for consistent treatment of the victim of the uninsured motorist.⁷⁷ California's statute is probably the best of these. It provides that uninsured motorist insurance shall be inapplicable,

[t]o bodily injury of the insured while in or upon or while entering into or alighting from an automobile other than the described automobile if the owner thereof has insurance similar to that provided in this section.⁷⁸

75. *Id.*

76. *Id.* at 217, 181 N.W.2d at 838.

77. CAL. INS. CODE § 11580.2(c) (2), (d) (West 1972); IOWA CODE § 516A.2 (Cum. Supp. 1972); TENN. CODE ANN. § 56-1152 (1968).

78. CAL. INS. CODE § 11580.2(c) (2) (West 1972).

It also provides,

[s]ubject to [the above] paragraph . . . , the policy or endorsement may provide that if the insured has insurance available to him under more than one uninsured motorist coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and such damages shall be prorated between the applicable coverages as the limits of each coverage bears to the total of such limits.⁷⁹

Note that the two provisions correspond very closely to the two paragraphs contained in the "other insurance" clause and operate solely to validate the use of these provisions.

A similar provision, L.B. 832, was introduced in the Nebraska Legislature in 1971. Though it was not passed, the Banking, Commerce, and Insurance Committee's Statement on L.B. 832 is instructive.

The theory of the Supreme Court was that since a person pays \$2.00 for this coverage on each car, he is entitled to the full benefit of each policy. Of course, this ignores the fact that a family of three cars exposes the insurance company to three times the risk that the person with one car does. No contention is made that the insurance companies will have any trouble living with this coverage as enlarged by the Supreme Court. They can, and if necessary will. But to do so rates will have to be increased accordingly.

The effect of the adoption of L.B. 832 will be to retain the concept of keeping this coverage simple and cheap so almost everyone will buy it. A contrary course would lose sight of the original objective—the availability of a modest coverage at extremely low rates which will afford protection to almost everyone against injury by the uninsured driver.⁸⁰

In addition, L.B. 832 provided for setoffs for any amounts paid by the insurer on behalf of medical payments coverage, and for any payments made to the insured under workmen's compensation benefits. This provision should be eliminated⁸¹ and replaced by a "declaration of purpose," which would be calculated to communicate more clearly to the courts that the purpose of the legislation is to provide a cheap and simple form of protection, which protects the victims of the uninsured motorist to the same extent as they would have been, had they been injured by a driver insured to the financially responsible minimum.

79. CAL. INS. CODE § 11580.2(d) (West 1972).

80. *Committee's Statement on L. B. 832 before the Committee on Banking, Commerce, and Insurance*, 82d Leg., 1st Sess. 1-2 (1971).

81. See the discussions of *Stephens v. Allied Mut. Ins. Co.*, and *Booth v. Seaboard Fire & Marine Ins. Co.*, *supra*, for the reasoning behind this assertion. In essence, the proposed legislation would not have allowed the insured the same recovery as he would have received had he hit an insured motorist.

Next, the present statute should be amended by deleting the provision which requires a written request by the insured in order to obtain uninsured motorist coverage after he has, once rejected it. The original rejection should be in writing, and it should be required that at the time of each subsequent renewal there be a written rejection by the insured. The present statute has the effect of not forcing the insured in a subsequent year to consider again whether to purchase uninsured motorist protection. This small effort on the part of insurance companies might decrease the number of persons who reject such coverage.

Finally, the insurance companies must be compelled to make available uninsured motorist coverage from the statutory minimum, up to and including the maximum limits for which the insured's liability policy is issued. Possibly an oral offering by the insurance agent should be required at the time of the writing of the policy. In any event, it is imperative that such coverage be made available. It seems absurd that people, who now protect the lives and well-being of others (as well as the insured's financial well-being) through their liability coverage in amounts up to \$100,000 per person per accident, and \$300,000 per two or more persons per accident, protect the lives and well-being of themselves and their families in the minimal sum provided for in the financial responsibility act. It is important that such people have at least an *opportunity* to purchase higher limits.

V. CONCLUSION

Mandatory uninsured motorist protection has been widely adopted to provide for the protection of persons injured through the negligence of those who do not conform with the financial responsibility laws. Insurance companies have sought to restrict their coverage through various liability limiting provisions within the uninsured motorist policies. Many courts have invalidated such clauses holding such "limitations" of the mandatory statute void. These courts have failed to interpret correctly the requirements of the statute. The person injured by the uninsured motorist should be guaranteed the same amount of funds from which to collect damages as the person insured to the statutory minimum, because that is all the uninsured motorist statute requires. This policy should be set out in corrective legislation which allows limitations within uninsured motorist policies which result in the injured motorist being compensated equally, whether hit by an insured or an uninsured motorist.

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